RIGHTS STUFF

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Providing "Reasonable Accommodation" Not Always Practical

The Methodist College of Nursing hired Eileen Jackson as a professor. During her first six months, she received three warnings for unprofessional behavior in the classroom, yelling at her supervisor and delaying the state nursing licensure. A month later, Methodist removed her from a lecture course because students were complaining about her.

Jackson requested a private office and an exemption from having to teach a new course every semester. She later argued that she made these requests to accommodate her disability, attention deficit disorder, but she did not show that Methodist knew about her ADD.

Shortly after Jackson made these requests, she told a social worker about her diagnosis. She said that she hated entering the classroom and that she sometimes experienced job-related panic attacks. The social worker in turn sent Methodist some suggestions to help Jackson meet Methodist's job performance standards, including a checklist of duties, more defined procedures and forms and allowing her to co-teach.

Methodist's response to the social worker's suggestions was that college professors should not need a checklist to prepare for a course they are teaching. It said that it had already provided procedures and forms in the employee handbook. Methodist said Jackson could co-teach, but she would have to take a pay reduction because she would no longer be a full professor. She declined that offer.

During the next year, Methodist said Jackson's job performance declined further. The school received multiple complaints about her from external clinical sites. Her supervisor met with her because she "failed to observe boundaries between herself and others, failed to follow directions from her supervisors, failed to follow established protocol, failed to use her time productively, failed to observe office hours, failed to produce any scholarly works . . . [and] failed to attend a faculty meeting." The supervisor warned Jackson that if her performance didn't improve, she would be terminated.

A month later, three students in Jackson's class had an argument. Jackson tried to talk to one of the students after class, but the student didn't want to talk to her. She then went to the student's dorm room uninvited to discuss the argument. The student complained to Methodist about her visit, which led to Jackson being placed on administrative leave and then being terminated.

Jackson sued, saying that Methodist failed to accommodate her disability, that it fired her because of her disability and that it retaliated against her for requesting reasonable accommodations.

The Court found that Jackson did have a disability as that term is defined by the Americans with Disabilities Act. But the Court found that she was not able to do the essential functions of her job with or without a reasonable accommodation.

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Illegitimate Explanations

Barry Duncan began working for Fleetwood Motor Homes of Indiana as a material handler. In December, 2003, he hurt his back at work when he was moving a box that weighed between 60 and 70 pounds. His doctor imposed temporary work restrictions, initially limiting him to lifting no more than 25 pounds. This was increased to 30 pounds in January and 40 pounds in April. He kept doing the essential functions of his job, never asking for any formal accommodation. About once a week, he needed to move a box that weighed 60 to 70 pounds, and he would get someone to help him do that. He received medical treatment for his back and never missed a day of work. On July 13, 2004, his doctor released him from all work restrictions.

A few weeks after his full medical release, Duncan noticed that some other employees were wearing armbands designed to reduce elbow pain. He asked for a pair of armbands from the safety station. The attendant asked Duncan about his back, and Duncan said he still had some minor pain in his leg and hip.

Shortly after this discussion, Fleetwood told Duncan that he had to undergo a functional capacity evaluation (FCE) to gauge his fitness to do his job. A physical therapist conducted the FCE in August, using a job description prepared by WorkSTEPS, an outside consultant. According to this job description, material handlers had to be able to lift 97 pounds occasionally and 73 pounds frequently. Duncan said that material handlers don't in fact lift boxes that heavy without help from a machine or a co-worker. The physical therapist as well doubted the credibility of the job description, noting that Duncan had returned to work after his injury without any incident or missed days. Nevertheless, she found that Duncan was not able to do the essential duties of his job listed on the job description, in that he was not able to lift 97 pounds occasionally or 73 pounds frequently. Then his doctor imposed permanent restrictions on Duncan, barring him from ever lifting 97 pounds and from frequently lifting 73 pounds. Fleetwood's safety manager told Duncan that given those restrictions, he probably could not continue to be a material handler. Duncan tried to argue that he could do the job because he had in fact been doing the job to the company's satisfaction, but Fleetwood didn't agree.

Fleetwood placed Duncan on unpaid medical leave on September 9 because the FCE said he couldn't do the essential duties of his job. He asked what duties he couldn't do but was not given an answer. Instead, his supervisor, about the same age as Fleetwood (51), said that Duncan "must recognize that the two of them no longer could do many things."

When Fleetwood placed Duncan on leave, it told him that he would be fired if he couldn't find another position within the company within 30 days. He was told it was his responsibility to call the company every day to ask about openings. He called twice a day. He was offered a clerical position, but declined it because he didn't want to work the night shift. Then he was offered and accepted an assembler job, a job that provided less opportunity to earn overtime.

When Fleetwood replaced Duncan with an employee under age 40, Duncan sued, alleging age discrimination in employment. The Court of Appeals said that Fleetwood's explanation for Duncan's situation could not be seen as legitimate. The 73-pound and 97-pound lifting requirements were not "genuine demands of the job." The Court said that it was "mystified . . . that Fleetwood would say Duncan could not perform the job of material handler when he was doing exactly that on a daily basis without incident or criticism." The company's explanation, the Court said, was "objectively unreasonable." Fleetwood provided no evidence that it used the new job description for any other currently employed material handler, including Duncan's replacement.

Fleetwood argued that it could not have been discriminating against Duncan because it offered to find him a new job. The Court said that the question was not whether Fleetwood wanted Duncan to leave the company because of his age but "whether it removed him from his job as a material handler on that basis." Because of Fleetwood's actions, Duncan was out of a job for several months and then was given a less desirable job.

Fleetwood also argued that WorkSTEPS bore the responsibility for the decision to remove Duncan from his job because it drew up the job description. The Court said that this contention was "nonsensical, most importantly because there is absolutely nothing in the record to suggest that Fleetwood did not play a dominant role in creating the job description."

The lesson of this case is while courts will give employers a fair amount of discretion in determining what duties are essential, that discretion is not unfettered. The case is Duncan v. Fleetwood motor Homes of Indiana, Inc., 518 F. 3d 486 (7th Cir. 2008). ♦

The "Old Guard" And Age Discrimination

Laverne Tubergen, a 65-year-old man, worked for St. Vincent Hospital and Health Care Center as the medical director for certain clinical services. In late 2002, St. Vincent hired a new chief operating officer, James Houser, and gave him a mandate to improve operations. Houser implemented a plan he hoped would make the hospital more efficient. Under the plan, St. Vincent eliminated more than 300 positions, including Dr. Tubergen's position.

When Houser told Dr. Tubergen that his position was being eliminated, he said, "This has nothing to do with your performance. Your job has been eliminated. We welcome you to review at any time the St. Vincent job postings and apply for any vacant position for which you are qualified."

Dr. Tubergen chose not to apply for any openings, believing that doing so would be futile as he didn't think the hospital would take him seriously. He heard second-hand that Houser had said that he was "getting rid of the old guard." He talked to someone who had heard Houser make this comment, and learned when Houser made the comment, he was referring to the children's hospital personnel. Dr. Tubergen did not work for the children's hospital.

Dr. Tubergen filed a complaint of age discrimination in employment, arguing that St. Vincent fired him because of his age. The courts did not agree.

Both the District Court and the Court of Appeals said that the "old guard" comment was not enough to prove age discrimination. The Court of Appeals, quoting another age discrimination case, said that "[n]o weight can be attached to an overheard comment that [the plaintiff] does not like to promote 'good old boys,' since any competent user of the English . . . language knows that to be a good old boy one need not be old, or for that matter good." Similarly, the Court of Appeals said, "members of the 'old guard' need not be old." In context, it was clear that the comment had nothing to do with Dr. Tubergen.

Dr. Tubergen also argued that the hospital gave younger administrators whose positions had been eliminated automatic consideration for employment under the new structure. But there was evidence to show that the hospital did consider Dr. Tubergen for new positions, even though he did not apply, and determined that he was not the best person for these jobs. The reduction in force did not affect only older employees. The people who were offered new jobs under the new structure had experience relevant to their new jobs that Dr. Tubergen lacked.

The case is Tubergen v. St. Vincent Hospital and Health Care Center, Inc., 517 F. 3d 470 (7th Cir. 2008). ♦

Housing Discrimination Case Pending In Texas

We often get questions at the BHRC about if and when landlords must allow tenants to have service dogs, even if they don't allow pets as a rule. A case is pending in Texas that relates to those inquiries.

Charles Gillia, a man with a mental disability, rents an apartment in Austin, Texas from Lamar Square Apartments. His doctor recommended that he get a support animal as part of his therapy. He asked Lamar's manager for permission. The manager refused his request, noting that Lamar's policy prohibited pets weighing more than 25 pounds. Mr. Gillia's dog weighs 38 pounds, but is not strictly a "pet." Rather, the dog is a support animal for a person with a disability.

Mr. Gillia asked the Austin Tenant's Council to help him prepare a formal request for an accommodation in the form of an exception to the weight limit policy and ATC did so. They also sent Lamar a copy of a letter from Mr. Gillia's doctor supporting the request. Lamar again denied the request.

Nothing in fair housing laws requires landlords to approve every request for reasonable accommodations. Landords may reject requests for reasonable accommodations if there is no disability-related need for the requested accommodation or if providing the accommodation would be unreasonable (too expensive or burdensome). Whether a specific request is unreasonable is determined on a case-by-case basis.

In this case, Mr. Gillia's need for a support animal was related to his disability, according to his doctor. It's not yet clear if allowing the 38-pound dog would impose an undue financial or administrative burden on Lamar. The lawsuit is pending and meanwhile, Mr. Gillia is living without his support animal. ♦

"Reasonable Accommodation"

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The Court said that allowing her to co-teach would have constituted creating a new job, which the ADA never requires. The Court also said that it was not convinced that a co-teacher would have helped her do the job, "considering her admitted limitations regarding the classroom, which co-teaching would not alleviate." Co-teaching would not have apparently helped her avoid having panic attacks, nor would it have reduced her hatred of the classroom. The Court said that "none of the suggested accommodations would prevent the aggressive and inappropriate behavior for which Jackson ultimately was terminated. There is no reasonable accommodation that would allow Jackson to perform the professor job."

The case is Jackson v. Methodist Medical Center of Illinois, 2008 WL 1848169 (C.D. Ill.). ♦

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